No. 89-542

In The

Supreme Court of the United States

October Term, 1989

RUDY PERPICH, as Governor of
The State of Minnesota,

and

THE STATE OF MINNESOTA,
by its Attorney General
Hubert H. Humphrey, III,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Does the Montgomery Amendment, which gives the federal government power to require National Guard training without governors' consent and without a declaration of a national emergency, violate the militia training clause of the United States Constitution?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following are respondents: United States Department of the Air Force, United States Department of the Army, National Guard Bureau, the Secretary of Defense, the Secretary of the Army, the Secretary of the Air Force, and the Chief of the National Guard Bureau.

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OPINIONS BELOW

The opinions below are set forth at pp. A-1, A-63 and A-141 of the Petition For Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit in this case.

The opinion of the district court is reported at 666 F. Supp. 1319 (D. Minn. 1987) and appears at A-141.

The panel opinion of the United States Court of Appeals for the Eighth Circuit is unreported and appears at A-63.

The *en banc* opinion of the United States Court of Appeals for the Eighth Circuit is reported at 880 F.2d 11 (8th Cir. 1989) and appears at A-1.

JURISDICTION

The jurisdiction of this Court is asserted pursuant to 28 U.S.C. § 1254(1). The Petition For Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit was timely filed on September 26, 1989, within 90 days after entry of judgment on June 28, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION
Art. I, § 8, cl. 12 ("army clause")
Art. I, § 8, cl. 15 ("militia federalization clause")
Art. I, § 8, cl. 16 ("militia training clause")
UNITED STATES STATUTES
10 U.S.C. §§ 672(b), (d) and (f) (1988) (The text of these constitutional and statutory provisions are reprinted in the Appendix to this brief).

STATEMENT OF THE CASE

The states and the federal government have shared control over the militia, pursuant to the provisions of Article I, Section 8 of the United States Constitution, for nearly 200 years. Congress was granted the power to

raise armies and to discipline and call the militia into the federal service when the national security was threatened. In the absence of such threat, the states were reserved general authority over the militia and the express power to train the militia and to appoint its officers. This shared control reflected a firm desire by the Framers of the Constitution to provide a check on the abuse of federal military power. The militia, which is now called the National Guard, is available to the states to handle local emergencies and is federally trained throughout the world. Such training, however, has been done at the governors' expressed consent, reflecting the states' reserved constitutional power over training.

In 1985, state National Guard units from various states were ordered to train in Honduras. The orders were controversial and immersed the National Guard in the intense national debate over the wisdom of United States policy in Central America. Several governors objected to using state National Guard training in a provocative and possibly dangerous manner in a politically sensitive area. The Governor of Maine refused consent to training of a 48-member unit in Honduras and several other governors threatened to follow suit.

A U.S. Senate subcommittee responded in 1986 by conducting hearings to examine whether the governors' statutory consent provisions should be modified. After objections by 22 governors, among others, the idea was abandoned. However, the effort was resurrected in the House of Representatives in the form of an amendment to a defense appropriations bill. Debate was limited to ten minutes. The measure passed and was included in the bill

signed by President Reagan. The "Montgomery Amendment," as the law became known, prohibits governors from withholding consent to federal training outside the United States because of any objection to the location, purpose, type, or schedule of the training.

When confronted with an order in January, 1987, sending a Minnesota National Guard unit into training in Honduras, Governor Rudy Perpich and the State of Minnesota sought a permanent injunction against enforcement of the Montgomery Amendment. Complaint, J.A. 3-8. Governor Perpich and the state also sought a declaration of the court that the Montgomery Amendment violates provisions in the Constitution which expressly reserve training power to the states. *Id.* Under the Montgomery Amendment, Governor Perpich, as Commander-in-Chief of the Minnesota National Guard, could no longer refuse consent to overseas training.

Defendants moved for dismissal of the complaint for failure to state a claim upon which relief can be granted, and plaintiffs moved for summary judgment. A-142. The district court treated defendants' motion as one for summary judgment, granted defendants' motion and denied plaintiffs' motion. A-142, A-153.

A three-judge panel of the court of appeals reversed the judgment of the district court and found that the Montgomery Amendment violated the states' reserved training power. A-123. The defendants petitioned for rehearing. The petition was granted, and the panel's opinion and judgment was vacated. A-62.1. The *en banc* court of appeals affirmed the judgment of the district court with two judges filing a dissenting opinion. A-1

SUMMARY OF ARGUMENT

The United States Constitution expressly reserves to the states the authority of training the National Guard. The Montgomery Amendment nullifies this specific reservation by prohibiting the elected governors of the states from exercising control over foreign training of the National Guard. The opinion of the court of appeals strikes even further at the constitutional guarantee by finding that Congress possesses unlimited power to federalize the National Guard at any time, for any reason, and for any duration.

The plain meaning of the militia training clause cannot be more evident. The authority of training the National Guard is reserved to the states. The Montgomery Amendment eliminates that authority, one of the few express powers reserved to the states, and is unconstitutional.

Provisions of the Constitution must be construed harmoniously in order to give full effect to all of its guarantees. The court of appeals decision fails to harmonize the army clause with the militia training clause and instead grants Congress unlimited authority to ignore the militia training clause. Harmonious construction of the clauses requires a finding that the Montgomery Amendment is unconstitutional.

The Framers of the Constitution intended to provide shared state-federal control over the National Guard. The debates at the constitutional convention demonstrate that the militia training clause was intended to impose a state check on the abuse of federal military power in the absence of a compelling national exigency, or emergency.

It was the Framers' judgment that divided state-federal authority over the National Guard was an important balance between the need for an effective national defense and the need to prevent abuses of centralized military authority. The intent of the Framers is an important guide to the proper interpretation of the interplay between the army clause and the militia training clause. The court of appeals ignored this important authority. If the court had examined the Framers' intent, it would have found that the Montgomery. Amendment clearly violates the Constitution.

Congress has consistently recognized the states' reserved authority over training in the absence of an emergency. The Dick Act of 1903, the National Defense Act of 1916, the National Defense Act Amendments of 1933 and the Armed Forces Reserve Act of 1952 all preserve state control over National Guard training in the absence of a threat to the national security. The Montgomery Amendment is the first Congressional enactment which fails to recognize the militia training clause.

The Court's opinion in the *Selection Draft Law Cases* was misinterpreted by the court of appeals. In this World War I decision, the Court addressed the constitutionality of mandatory conscription during a declared war. The decision also suggests reserved state control over National Guard training in peacetime in the absence of a national exigency. It provides no support for the Montgomery Amendment.

The dual enlistment concept, under which state National Guardsmen are required to register concurrently as members of the National Guard of the United States, does not and cannot eliminate state reserved authority over training. The court of appeals erred by permitting

Congress under the dual enlistment concept to simply call the militia a different name and eliminate at will its essential constitutional character.

The Montgomery Amendment cannot be justified by practical necessities. At any time the national security is threatened, the National Guard can be quickly integrated into the federal service. Claims that the Montgomery Amendment is necessary to preserve our national defense or to prevent the nation's governors from conducting foreign policy are wholly unsupported. The court of appeals decision granting Congress unlimited power to nullify the states' reserved authority over training, at the mere whim of federal authorities, is incorrect. The Montgomery Amendment is an unnecessary federal power grab that violates an unambiguous command in the text of the United States Constitution.

ARGUMENT

I. THE PLAIN MEANING OF THE MILITIA TRAINING CLAUSE AND THE REQUIREMENT THAT CONSTITUTIONAL PROVISIONS BE CONSTRUED HARMONIOUSLY REQUIRE INVALIDATION OF THE MONTGOMERY AMENDMENT.

The Montgomery Amendment disregards the express language and plain meaning of the militia training clause which expressly reserves to states the authority to train the militia. By removing the gubernatorial consent requirement, the Montgomery Amendment permits federalization of the National Guard for training without states' consent and eliminates the power expressly reserved to the States in the militia training clause. The Montgomery Amendment can be upheld only by finding

that the militia training clause is no longer valid, thus betraying the principle that constitutional provisions are to be construed harmoniously.

A. The Montgomery Amendment Violates The Plain Meaning Of The Militia Training Clause.

The militia training clause authorizes Congress

> To provide for organizing, arming and disciplining the Militia and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers and the authority of training the Militia according to the discipline prescribed by Congress.

The plain meaning of the words – reserving to the states the authority of training the militia – cannot be more clear. The Constitution in Article I, Section 8, grants significant military powers to the federal government, but specifically excepts from those powers the authority of training the National Guard.[1] That power is reserved to the states.

In *Reid v. Covert*, 354 U.S. 1 (1957), Justice Black noted the importance of the plain meaning of the Constitution.

> This Court has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning. . . . 'The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition. . . . The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase . . . is persuasive evidence that no qualification was intended.'

Id. at 8 n.7. *citing United States v. Sprague*, 282 U.S. 716, 731 (1931).

[1] The "National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16, of the Constitution." *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46, *vacated on other grounds*, 382 U.S. 159 (1965).

The plain evident meaning of the militia training clause is that the states, not the federal government, are authorized to train the militia. The words "reserve" and "authorize" have obvious meanings. *See, e.g., Meigs v. M'Clung's Lessee*, 13 U.S. (9 Cranch) 11, 18 (1815) (reserve means "set apart"); *Blair v. City of Chicago*, 201 U.S. 400, 457 (1906) (authorize means "to clothe with authority" or "to give legal power to"). "Discipline," as used in the context of the militia training clause, means uniform training exercises and was intended to ensure that states trained the militia according to the same standards. *See infra* n.5.

In contrast to the general reservation of state powers in the Tenth Amendment, the Court has a heightened duty to effectuate the plain meaning of the militia training clause because the clause is one of the few express elements of state sovereignty specifically reserved by the Constitution. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550 (1985) (noting significance of specifically reserved state powers in contrast to general reservation in Tenth Amendment). The court of appeals

judgment upholding the Montgomery Amendment contravenes "the general conviction that the Constitution precludes 'the National Government [from] devour[ing] the essentials of state sovereignty.' " *Id.* at 549 (citation omitted).

By construing the Constitution to permit federal authorization of National Guard training whenever the army clause power is invoked, the court of appeals emptied the militia training clause of any significant meaning.

B. The Militia Training Clause Is An Integral Part Of The Constitutional System Of Shared Control Over Military Authority.

The militia training clause is part of a carefully designed system of constitutional checks and balances intended to assure shared control over military authority. Congress is granted broad powers to raise and support federal armies, but military appropriations are limited to a two-year duration. U.S. Const. art. I, § 8, cl. 12. The power to train the militia and to appoint its officers is reserved to the states, but Congress is to specify the training regimen. *Id.*, cl. 16. The states' right to maintain a militia is further guaranteed by the Second Amendment. *Id.*, amend. II. Congress is granted the power to federalize the militia, but only during periods of extreme need, such as a declared national emergency, or one of the express purposes described in the militia federalization clause. *Id.* art. I, § 8, cl. 15; *see* discussion *infra* at 15-16. This constitutional framework is carefully designed, and the reservation of training authority to the states should be observed no less than Congress' power to raise and support federal armies or the two-year military appropriation limit.

By nullifying the states' reserved power to consent to overseas federal training of the National Guard, the Montgomery Amendment eliminates an integral part of the constitutional framework for shared control of military authority.

C. The Principle Of Harmonious Construction Requires Invalidation Of The Montgomery Amendment.

The court of appeals decided that the army clause completely subordinates the militia training clause and, as a result, the Montgomery Amendment is constitutional. In other words, whenever Congress in its discretion chooses to exercise army clause powers, the militia training clause is inoperative and has no effect or meaning. The court tautologically characterized the issue before it as:

> [W]hen the State claims a right to Militia training, and Congress claims 'we're training the Army, not the Militia,' who wins?

Court of Appeals Opinion at A-9. The court of appeals thereby unburdened itself of any obligation to construe constitutional provisions harmoniously. Its construction nullified the militia training clause.

The principle of harmonious construction is useful and long-standing. Under the Constitution, "granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Just "[a]s no constitutional guarantee enjoys preference, so none should suffer subordination or deletion." *Ullman v. United States*, 350 U.S. 422, 428 (1956).

The Court should:

> [G]ive to the words of each [clause of the Constitution] just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed. . . . If by one mode of interpretation the right must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode it will attain its just end and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail.

Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 610-612 (1842).

The invocation of Congress' army clause power does not nullify any other clause. The power is not plenary. It "cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought into its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' " *United States v. Robel*, 389 U.S. 258, 264 (1967) (quoting *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 426 (1934)).[2] While Congress' power to raise and support armies is broad, it cannot be construed in a manner which nullifies other constitutional guarantees.

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[2] *See also Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (in military affairs area as in any other, Congress subject to limitations of Due Process Clause); *Gillette v. United States*, 401 U.S. 437 (1971) (army power must accommodate establishment clause of first amendment); *United States v. O'Brien*, 391 U.S. 367 (1968) (army power must accommodate first amendment free speech); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963) (war powers and powers to regulate foreign relations subject to due process); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919) (war power subject to applicable constitutional limitations).

The application of harmonious construction in this case yields a principled and practical result that does not diminish the scope of either the army or militia training clauses. It permits governors to withhold consent to National Guard training exercises whenever the National Guard is not needed for a declared national emergency. The two clauses are thus harmonized in a manner that gives full effect to each grant of authority.

The court of appeals interpretation violates the unambiguous meaning of the militia training clause and fails to construe harmoniously all constitutional provisions concerning military authority. The court permitted the Montgomery Amendment to cast aside the balance that has worked well in practice for nearly 200 years.

II. THE FRAMERS' INTENT CONCERNING THE MILITIA CLAUSES OF THE CONSTITUTION IS VIOLATED BY THE MONTGOMERY AMENDMENT.

The plain meaning of the militia training clause is reflected in the clear and unambiguous intentions of the Framers. An examination of the Framers' intent, which the court of appeals failed to make, demonstrates that the states' authority reserved in the militia training clause was intended to provide a state check on the abuse of federal military power, without handcuffing the national defense power during a national emergency.

A. Provisions Of The Constitution Must Be Construed In Accordance With The Intent Of The Framers.

The vital importance of the Framers' intent in construing the Constitution is unquestionable.

The judiciary has long been entrusted with the task of applying the Constitution in changing circumstances, and as conditions change the Constitution in a sense changes as well. But when the court gives the language of the Constitution an unforseen application, it does so, whether explicitly or implicitly, in the name of some underlying purpose of the Framers. This is necessarily so; the federal judiciary, which by express constitutional provision is appointed for life, and therefore cannot be held responsible by the electorate, has no inherent general authority to establish the norms for the rest of society. It is limited to elaboration and application of the precepts ordained in the Constitution by the political representatives of the people. When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the Constitutional structure which it is its highest duty to protect.

Oregon v. Mitchell, 400 U.S. 112, 202-03 (1970) (Harlan, J., concurring in part and dissenting in part) (footnotes omitted). *See also Ex parte Bain*, 121 U.S. 1, 12 (1887) (court should put itself "as nearly as possible in the position of the men who framed that instrument"); *Woodson v. Murdock*, 89 U.S. (22 Wall.) 351, 369 (1874) (constitutional clauses are to "be held to express the intention of its Framers").

B. The Militia Clauses Were A Compromise Which Divided Authority Over The Militia Between The Federal Government And The States.

The delegates to the Constitutional Convention in 1787 were deeply divided over the core governmental function of control of the military. Nationalist delegates

believed the federal government must have total control over state militias in order to ensure the nation's defense. States' rights delegates feared that such federal power over state militias would lead to oppression of the states and citizenry, to an inability by the states to meet their own needs, and to costly, unpopular military adventurism.

After several months of proposals and hard-fought debates, it became apparent that neither nationalist nor states' rights delegates had sufficient power to impose their views regarding control of the militia. The ability of the states' rights delegates to exact significant concessions, however, is clearly demonstrated by the debates at the Convention. The Convention ignored a proposal by Alexander Hamilton that would have given the federal government plenary control over the militia.[3] *See* J. Madison, Notes of Debates on the Federal Convention 164 (Hunt 1920). Delegate George Mason of Virginia offered three successive proposals to the Convention, each providing increased state control over the militia. The final proposal, which was also rejected, called for limiting federal "regulatory" authority over the militia to only ten percent of the year for the purpose of establishing uniformity in training. S. Doc. No. 695, 69th Cong., 2d Sess. 31-35 (1917) ("*The Militia*").

Eventually, a finely tuned compromise began to emerge, dividing militia authority between the federal and state governments. The Convention agreed that the state militias would be placed under federal control in

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[3] Ironically, Hamilton's unsuccessful proposal mirrored the effect of the Montgomery Amendment at issue in this case.

emergency situations, such as when insurrection or invasion was threatened, or when the militias were needed to enforce the laws of the country. U.S. Const. art. I, § 8, cl. 15. However, in the absence of such threat, the states would retain authority over their militias. *Id.* art. I, § 8, cl. 16. The compromise also authorized Congress

> [t]o provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States,
>
> while concurrently
>
> *reserving to the States* respectively the Appointment of the Officers, and *the Authority of Training the Militia* according to the discipline prescribed by Congress.

Id. (emphasis added).

The authority to appoint officers was given to the States in order to secure for them "a preponderating influence over the militia." *The Federalist No. 29* at 185 (A. Hamilton) (J. Cooke ed. 1961) ("Cooke").

The debates at the Constitutional Convention indicate that the militia training clause was designed to ensure that the power to "organize, arm, and discipline" state forces delegated to the federal government by the militia clauses did not surreptitiously extend federal control over the actual training of the militia. Delegate Sherman suggested that the clause relating to training should be deleted because he believed it "unnecessary." He believed that the States would obviously retain this authority unless they specifically ceded it to the Federal government. Madison's Notes of the Convention, *reprinted in The Militia, supra,* at 35. In response, Delegate

Elseworth cautioned Sherman that the federal "discipline" power over the militia might be construed expansively without the state reservation of training provision. Madison's notes contain the following:

> Mr. Elseworth doubted the propriety of striking out the sentence. The reason assigned applies as well to the other reservation of the appointment to offices. He remarked at the same time that the term discipline was of vast extent and might be so expounded as to include all power on the subject.

Id. After hearing Elseworth, Mr. Sherman withdrew his motion to delete the training clause. *Id.*

The militia clauses embody a fundamental structural decision by the Framers concerning a core function of government.[4] They provide a finely tuned divided authority over the militia reflecting a hard fought compromise between two factions. The compromise provided the federal government plenary control over state militia troops when the national security was threatened. In the

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[4] The delegates adopted another significant check on centralized military power. They permitted a standing federal army, but divided authority over it between Congress and the Executive and specifically limited the army's power by declaring that military appropriations had to be approved every two years. U.S. Const. art. I, § 8, cl. 12. Nearly universal among the delegates was the profound fear of a large, federally controlled standing army. The Framers identified such a force with British tyranny, potential oppression of the States and individual citizens, and expensive, unpopular military adventures. As Edmund Randolph stated, "there was not a member of the Federal convention who did not feel indignation" at the idea of a standing army. 3 J. Elliot, *The Debates in The Several State Conventions on the Adoption of the Federal Constitution,* 401 (1901) ("Elliot").

absence of emergency or threat to the national security, states were given control over the militia. An essential aspect of the compromise gave the federal government authority to set the "discipline" or standards for training[5] and the states the authority to conduct the actual training of the militia. The Montgomery Amendment radically departs from the compromise and makes the Framers' promise of state training authority nothing more than empty words.

C. The Framers' Compromise Was Intended To Provide A State Check On Domestic Oppression And Military Adventurism By The Federal Government.

Opponents of absolute federal control over the militia feared centralized military authority. They feared that

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[5] The debates at the Constitutional Convention made clear that "discipline" pertained to "prescribing the manual exercise evolutions, etc." S. Doc. No. 695, 64th Cong., 2d Sess. 35 (1917) (*"The Militia"*). *See also* Weiner, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 214 (1940) (early militia legislation used "discipline" to mean a "system of drill"). In 1902, a Congressional Report analyzing the debate at the Constitutional Convention explained the Framers' understanding of the term "discipline" as:

> [T]he tactics or drill regulations of the different arms or corps, and such other books and manuals as are provided for the instruction of troops; the purpose being to secure uniformity and training in the militia of the several States, and at the same time to reserve to the States and Territories, respectively, the duty of training or disciplining their militia in accordance with the methods prescribed by Congress or by the President under its authority and direction.

H.R. Rep. No. 1094, 57th Cong., 1st Sess. 19 (1902).

such unhindered authority would lead to domestic oppression by the federal government, and the possibility of expensive, unpopular federal military adventurism.

Opponents of absolute federal control over the militia voiced specific fears during ratification debates[6] that under the Framers' compromise whole states could be put under martial law,[7] that the federal government could call out the militia to oppressively exercise routine police powers,[8] and that federally controlled militia could invade the states.[9] Federal control over the militia was characterized as an "instrument of oppression"[10] that could "enslave the States" and lead to a "system of despotism."[11] They feared that absolute federal control

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[6] Ratification debates conducted through *The Federalist* and in state ratification conventions are a guide to the intended meaning of the Constitution. *See, e.g., Transportation Co. v. Wheeling*, 99 U.S. 273, 280 (1878) (Federalist Papers) and *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964) (state ratification conventions).

[7] *See* The Maryland Journal (No. 1021, March 18, 1788) (Luther Martin expressing the concern that Congress will "subject the freedom of a whole state to martial law and reduc[e] them to the situation of slaves."). *See* Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cinn. L. Rev. 919, 927 (1988) ("Hirsch").

[8] 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 283 (1901) ("Elliot") (Clay at Virginia Convention).

[9] *The Federalist Nos. 29 and 46.*

[10] *See Pennsylvania and the Federal Convention* 598 (McMaster and Stone ed.)

[11] *The Militia* at 31. (Gerry at Federal Convention).

over the militia would cause the states to "pine away to nothing"[12] as Congress inevitably exercised "military coercion."[13]

In response to critics, the Framers made clear that the compromise they struck at the Convention provided for state control over the militias as a check against the possibility of federal oppression. As Madison stated, in *The Federalist No. 46* (Cooke at 321):

> Let a regular army, fully equal to the resources of the country be formed; and let it be entirely at the devotion of the Federal government; still, it would not be going too far to say that the state governments with the people on their side would be able to repel the danger. . . . To these [a standing army] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.

Similarly, Hamilton in *The Federalist No. 29* (Cooke at 184-85) stated that the militia, while not precluding the need for a standing army, was "the best possible security against it, if it should exist."

The Framers also believed that state control over the militias was designed as a check on federal military adventurism. During the Ratification debates, critics of

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[12] *Id.* at 33.

[13] 3 Elliot, *supra* n.8, at 387 (Henry at Virginia Convention).

the compromise questioned whether the proposed militia clause allowed the federal government to abuse its military power by sending citizens far from home for indefinite periods in furtherance of military schemes objectionable to the states.[14]

In response, the Framers made clear that the federal government would only send the militia far from home in exigencies, such as when invasion or rebellion was threatened, or when there was a need to execute the laws. *See The Federalist No. 29.* Court of Appeals Dissenting Opinion at A-23. In normal times, the Framers asserted, the states and the people would assure that the federal government did not abuse its control of the militia. Hamilton emphasized that the militia were under "the preponderating influence" of the states. *Id.* (Cooke at 185). Thus, he continued, "what shadow of danger can there be from men who are daily mingling with the rest of their countrymen, and who participate with them in the same feelings, sentiments, habits, and interests?" *Id.* Hamilton concluded that if the federal government attempted to send state troops on such adventures, its actions would be based not on authority granted in the Constitution but rather on "imagined entrenchments of power." *Id.* (Cooke at 186). He believed that the states and the people would not countenance such clear violations of the law.[15] *See* Court of Appeals Dissenting Opinion at A-23.

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[14] *See* Letter of Luther Martin in the Maryland Journal, March 18, 1788, *reprinted in The Militia, supra* n.5 at 119; *see also* remarks of Luther Martin before the Maryland House of Representatives, November 20, 1787, *id.* at 117-18. Similar fears were also expressed at the Pennsylvania ratifying convention. *See Pennsylvania and the Federal Convention* 598 (McMaster and Stone ed.)

[15] *See The Federalist No. 29* (Cooke at 186) (emphasis added) where Hamilton stated that if the central government

(Continued on following page)

Similarly, Madison declared that the authority of the states "as co-equal sovereigns," together with the political power of the people, would form a significant check on the potential use of state militia for military adventurism by the federal government. He stated:

> Can we believe that a government of a Federal nature, consisting of many co-equal sovereigns, and particularly having one branch chosen from among the people, would drag the militia unnecessarily to an immense distance. This, sir, would be unworthy of the most arbitrary despot. They have no temptation whatever to abuse this power; such abuse could only answer the purpose of exciting the universal indignation of the people, and drawing on them the general hatred and detestation of their country.

3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 381-82 (1901) ("Elliot"). *See* Court of Appeals Dissenting Opinion at A-24. The reserved state authority over militia training provided by the Constitution was intended by the Framers to serve as a check by the states on the abuse of military power by the federal government. The Montgomery Amendment removes a fundamental part of the check and thereby violates the Framers' intent.

(Continued from previous page)

attempted such an abuse, "whither would the militia, irritated by being called upon to undertake a distant and distressing expedition for the purpose of rivetting the chains of slavery upon a part of their countrymen direct their course, but to the seat of the tyrants who had meditated so foolish as well as so wicked a project; to crush them *in their imagined entrenchments of power*, and to make them an example of the just vengeance of an abused and incensed people?"

D. The Second Amendment And The Guarantee Of Republican Government Clause Also Demonstrate That Reserved State Authority Over The Militia Was Designed As A Check On The Abuse Of Federal Military Power.

The Second Amendment to the Constitution provides:

> A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

U.S. Const., amend. II.

The preamble to this amendment makes clear that it was intended to reassure states' rights advocates who feared that the power of a large, federal standing army would diminish the "security of a free state." *See* discussion of *The Federalist Nos. 29 and 46, supra* at 20. The Second Amendment guaranteed the perpetual existence of a viable militia as a continued check on the military power of the federal government.[16] As the Supreme Court stated, "With the obvious purpose to assure the continuation and render possible the effectiveness of [the militia] the declaration and guarantee of the Second Amendment were made. [The Second Amendment] must be interpreted and applied with this in view." *United States v. Miller*, 307 U.S. 174, 178 (1939).[17] *See* Court of Appeals Dissenting Opinion at A-26. The Montgomery

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[16] The Second Amendment also nullified article I, § 10, which allowed Congress to deny states the prerogative of keeping troops in peacetime. *See* Note, *Should I Stay or Should I Go: The National Guard Dances to the Tune Called by Two Masters*, 39 Case W. Res. L. Rev. 165 (1988-89) ("Note").

[17] For further evidence supporting this view of the Second Amendment, *see* 1 *Annals of Congress*, 749-52, 766-67 (J. Gales,

(Continued on following page)

Amendment, which allows the militia to become a federal force at will, violates the terms of the Second Amendment.

The principle that state control over the militia was an explicit check against the abuse of federal military power was also made clear in the debates over the Guarantee of Republican Government Clause. U.S. Const., art. IV, §.4. That clause gave the federal government power to suppress domestic violence in the states. Many delegates believed this power, together with federal power over the militias in clauses 15 and 16, could create unchecked federal military power. Responding to such fears at the Virginia convention, Madison made clear:

> I cannot agree . . . that [in the Constitution] there is no check [on the federal military powers]. There is a powerful check in that paper. The state governments are to govern the militia when not called forth for general national purposes; and the Congress is to govern only such part of them as may be in the actual service of the Union. Nothing can be more certain and positive than this. It expressly empowers Congress to govern them when in the service of the United States. It is, then, clear that the States govern them when they are not.

3 Elliot, *supra*, at 424.

(Continued from previous page)

ed. 1789); 1 S. Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and the Commonwealth of Virginia*, App. 300 (1803); 3 J. Story, *Commentaries on the Constitution of the United States*, §§ 1890-91 (1833); Note, *supra* n.16, at 175-77.

E. The Framers Did Not Intend To Restrain Federal Authority Over The Militia During A National Emergency.

Although the Framers clearly intended the militia clauses to serve as a check on the abuse of the military power by the federal government, they also believed that the federal government's power over the military, specifically the power to raise armies, should be unquestioned by the states when the national security was threatened. Hamilton believed that the militia power was a fundamental check by the states on federal militia power and that the states were to have a "preponderating influence over the militia." *The Federalist No. 29* (Cooke at 185). However, he also believed that in the context of "national exigency" or "circumstances that endanger the safety of the nation," that the army power was to "exist without limitation." *The Federalist No. 23* (Cooke at 147).

Similarly, Madison declared that the state controlled militia was the best way to protect against a standing army and federal military adventurism. *The Federalist No. 46* (Cooke at 185). However, he also believed that the federal government's authority would be "most extensive in times of war and danger." *The Federalist No. 45* (Cooke at 321). (J. Madison). Madison further recognized the need "to give the general government the full power to call forth the militia and exert the whole national strength of the union, when necessary." 3 Elliot, *supra*, at 381. Similarly, George Washington, in a speech to Congress in 1793, proposed that the militia, under the new Constitution, would be prepared "for every military *exigency* of

the United States." 12 J. Sparks, *The Writings of George Washington* 39 (1839) (emphasis added).[18]

The Framers, in reserving the authority of training the militia to the states, made a considered express structural decision ordering federal and state roles in governing the militia under civilian authority. The Court of Appeals did not consult the Framers' intent. If it had, it could not have upheld the Montgomery Amendment on the basis that the militia training clause is subordinated to the army clause at will. The Framers' intent is clear: absent a declared national emergency, the states were reserved express authority to train the militia.

III. THE MONTGOMERY AMENDMENT ABANDONS A CONSISTENT CONGRESSIONAL UNDERSTANDING THAT THE STATES CONTROL THE NATIONAL GUARD IN THE ABSENCE OF A NATIONAL EMERGENCY.

The Montgomery Amendment marks a departure from careful observance of the constitutionally mandated state character of the militia by Congress. As in many other fields, the federal government, through the carrot of funding and the stick of compliance regulations, has gradually increased its *defacto* control over state National

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[18] Because the new nation was small and generally of isolationist sentiment, the three contingencies specified in clause 15 (insurrection, execution of the laws and invasion) may not have been intended to be exclusive, but rather indicative of the gravity of circumstance that would allow for federal control of state militias. *See Martin v. Mott*, 25 U.S. (12 Wheat) 19 (1827) (using the concept of "exigency" or threat to the national security interchangeably with the contingencies specified in Clause 15.) *See* Hirsch, *supra* n.5, at 930-42.

Guard units. Until the enactment of the Montgomery Amendment in 1986, however, Congress always explicitly recognized and protected state rights insured by the militia clauses of the Constitution.

In 1790, Secretary of War Henry Knox proposed a plan to organize the militia that "depended for its operation on extensive intervention by the United States into the affairs of the militia, affairs of which the states were then jealously possessive. As might be expected, therefore, it was defeated." W. Riker, *Soldiers of the States: The Role of the National Guard in American Democracy* 19 (1957). Congressional debate over the Knox proposal reflected Congress' understanding of the express nature of the reserved state authority over the militia. *See The Militia, supra*, at 123 (Remarks of Sherman).

The Dick Act, Act of January 21, 1903, ch. 196, 32 Stat. 775, began the process of increased federal supervisory control in exchange for grants-in-aid. In this act, Congress strictly differentiated between the "unorganized militia" of all men between certain ages, which existed only in name and principle, and the "organized militia," termed by the act the National Guard, which was the *actual* state militia. The Dick Act carefully observed state interests by forbidding the issuance of arms or assigning regular army officers to state guard units until state governors had requested such assistance. *Id.* at 777. It also prohibited joint encampments or maneuvers between the National Guard and the army unless the governors made a formal request. *Id.* at 777-78.

The National Defense Act of 1916, ch. 134, 39 Stat. 166 ("The 1916 Act"), continued the effort to further federal "organizational" control over state National

Guards. It provided, however, that "nothing contained in this act shall be construed as limiting the rights of the states and territories and the use of the National Guard within their respective borders in time of peace . . . " 39 Stat. at 198 (codified at 32 U.S.C. § 109(b)). The 1916 Act also declared that sentences of dismissal or dishonorable discharge from the National Guard must be approved by the governors of the respective states before they were effective. 39 Stat. at 209.

The National Defense Act Amendments of 1933, Act of June 15, 1933, ch. 87, 48 Stat. 155, were designed to remedy mobilization problems that had occurred during World War I. National Guard units, which were in a relatively high state of readiness, were disbanded and its members had to be drafted individually. The 1933 Act remedied this problem by allowing the federal government to mobilize National Guard units intact "so as to eliminate the delay incident to draft." S.Rep.No. 135, 73d Cong., 1st Sess. 2 (1933). To accomplish this goal, Congress created the "dual enlistment system." Dual enlistment required members of state National Guard to be concurrent members of a new entity called the National Guard of the United States ("NGUS").[19] The NGUS was a reserve component of the United States Army created under the authority to raise and support armies. Based on this dual status, the 1933 Act gave the president power to order the National Guard in its status as the NGUS into federal service, but only in a "national emergency" declared by Congress. The House and Senate reports

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[19] *See, e.g.*, 10 U.S.C. §§ 101(11) and (13), 261(a)(1) and (5), 269(b) (1988).

accompanying the 1933 Act indicate that in the absence of a national emergency, control over the militia or National Guard remained absolutely with the states. *See* S. Rep. No. 135 at 2; H.R. Rep. No. 141, 73rd Cong., 1st Sess. at 5. *See infra* at 37-39. *See* Court of Appeals Dissenting Opinion at A-44-45.

In 1952, Congress recodified all provisions of the United States Code relating to reserve components of the armed services. *See* Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481 ("1952 Act"). Section 233 of the 1952 Act for the first time relied on the army power of the Constitution to bring the National Guard into federal service for training. Respecting the clear terms of the militia clauses of the Constitution, however, the Act explicitly required the federal authority requesting National Guard participation to first obtain the consent of the relevant state governors. *See* 10 U.S.C. § 672(b) and (d).[20]

Congress rejected an earlier version of the 1952 Act, which omitted the gubernatorial consent provision, after National Guard spokesmen and others pointed to the militia clauses. General Ellard A. Walsh, speaking for the National Guard Association, declared that without the gubernatorial consent requirement the bill

> concentrat[ed] too much power in the Executive and too much authority in the Department of

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[20] In this light, the United States Military Court of Appeals found that the gubernatorial consent requirements of the statutes "has constitutional underpinnings in art. I, section 8 of the Constitution of the United States." *United States v. Peel*, 4 M.J. 28, 29 (C.M.A. 1977) (footnote omitted); *accord United States v. Self*, 13 M.J. 132, 135 (C.M.A. 1982); *United States v. Hudson*, 5 M.J. 413, 418 (C.M.A. 1978).

> Defense, and would in a number of instances infringe not only on the authority of the sovereign states but of the Congress as well.

He also stated the absence of a gubernatorial consent provision

> very definitely violates the provisions contained in the militia clauses of the Federal Constitution, and notably article I, section 8, clause 16 thereof, which reserves to the States the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress.

Court of Appeals Dissenting Opinion at A-48 n.26 (quoting *Reserve Components: Hearings on H.R. 4860 Before the Committee on Armed Services*, 82d Cong., 1st Sess. 473, 482-83 (1951)). Similarly Ernest Vandiver, Adjutant General for the State of Georgia, complained that the proposed bill "will delegate to the Pentagon the constitutional rights and powers imposed in the governors of the respective states to command their militia." *Id.* (quoting *Armed Forces Reserve Act: Hearings on H.R. 5426 Before the Senate Subcommittee on Armed Services*, 82d Cong., 2d Sess. 312 (1952)).

Throughout the statutory changes increasing *defacto* federal control over the National Guard, the Congress, until enactment of the Montgomery Amendment, never threatened the explicit state reserved authority for militia training provided by the militia training clause.

The Montgomery Amendment was enacted in 1986 after the Governor of Maine refused to allow forty-eight members of the Maine National Guard to participate in a training mission in Honduras and several other governors threatened to follow suit. Court of Appeals Dissenting Opinion at A-49-50 (citing *Hearings on Federal*

Authority Over National Guard Training Before the Subcommittee on Manpower & Personnel of the Senate Committee on Armed Services, 99th Cong., 2d Sess. (1986) (stenographic transcript) (1986 Senate Hearings)). In response, a subcommittee of the Senate Committee on Armed Services considered the question of abolishing the gubernatorial consent provisions in the 1952 Act. After hearings called on short notice, the subcommittee took no action.[21] One month later in the House, Representative G.V. Montgomery of Mississippi submitted an amendment to a Defense authorization bill. *Id.* at A-51. The proposed Montgomery Amendment prevented a governor from withholding consent for an active duty mission outside the United States because of his or her objections to "location, purpose or schedule of the mission." *See* Cong. Rec. H. 6267 (daily ed. at August 14, 1986). In essence, the proposed Montgomery Amendment nullified the gubernatorial consent provisions of the 1952 Act.

Because Rep. Montgomery's proposal was an amendment to a defense authorization bill, debate was limited to ten minutes. There were no hearings before the amendment reached the floor for a vote. Several representatives objected to such a significant change in defense policy, and the constitutional balance of power, without the benefit of hearings, *see id.* at H. 6263-68 (Remarks of Reps. Edwards and Schroeder), and with limited debate. *Id.* at

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[21] At the hearing, 22 governors expressed their objection to the proposal, including Governor John H. Sununu of New Hampshire who stated that the "legislative initiative is directly contrary to the language and intent of the U.S. Constitution." For a more extensive discussion, *see* Court of Appeals Dissenting Opinion, A-49, A-50.

6266-67 (Remarks of Rep. Dyson and Schroeder). Consideration of the amendment was further overshadowed by warnings that if the House did not act quickly to eliminate the gubernatorial consent requirement, the federal government would eliminate state National Guard funding. *See* Remarks of Rep. Montgomery, Cong. Rec. at H.6267; *see also* Testimony of James H. Webb, Jr., 1986 Senate Hearings, *supra* at 5-14; H.R. Rep. No. 718, 99th Cong., 2d Sess. 176 (1986) ("Webb Statement"); J.A. 27. The amendment was enacted and, after one technical change, the Senate conferees acquiesced. Legislative History of Pub. L. No. 99-661, 99th Cong., 2d Sess. 475 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 6413, 6534 (National Defense Authorization Act For Fiscal Year 1987) ("Legislative History").

With passage of the Montgomery Amendment, a fundamental reservation of power to the states, existing in the explicit text of the Constitution, supported by the historical intent of the Framers, and respected by Congress for one hundred and ninety-nine years, was eliminated in ten minutes.

IV. THE COURT OF APPEALS MISINTERPRETED *THE SELECTIVE DRAFT LAW CASES* AND THE CONCEPT OF DUAL ENLISTMENT.

In upholding the Montgomery Amendment, the court of appeals relied on this Court's decision in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), and on the concept of "dual enlistment" as mandated in the National Defense Act Amendments of 1933. The court of appeals misinterpreted both and, as a result, nullified the militia training clause.

A. The Selective Draft Law Cases Addressed Only The Constitutionality Of Wartime Conscription And Suggested State Control Over The National Guard Absent A National Exigency.

The *Selective Draft Law Cases* addressed challenges to the constitutionality of a wartime conscription act. *See* The Selective Draft Law of May 18, 1917, ch. 15, 40 Stat. 76. This Court held that wartime conscription was not prohibited by the terms of the militia clauses. 245 U.S. at 381-82. These cases involved Congress' exercise of its war powers,[22] were reviewed in the context of a world war and not peacetime, involved challenges by ordinary citizens not by the organized militia or National Guard, and did not involve the *training* of the militia, a right explicitly reserved to the states in the Constitution. The *Selective Draft Law Cases* do not in any respect control the issue before this Court.

The Selective Draft Law of 1917 warned that the country in the context of a declared war was faced with "an emergency which demands the raising of troops in addition to those now available." 40 Stat. at 76. Authority for the law, according to this Court, lay in the powers to declare war, to raise and support armies, to make rules for land forces, and the necessary and proper clauses. 245 U.S. at 377. The challenged provision gave Congress the authority to conscript citizens between the ages of 21 and 30 to serve in the federal army for the "then existing

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[22] The war power has been used by this Court to refer to all the military powers found in article I, § 8 and article II, § 2 of the Constitution. *See Lichter v. United States*, 334 U.S. 742, 758 (1948); *Hamilton v. Kentucky Distilleries*, 251 U.S. 146 (1919).

emergency." 40 Stat. at 76. This provision did not involve, in any sense, the organized militia or the National Guard. The power to draft members of the organized militia or National Guard, referred to by both the Court and the statute at issue, was controlled by a wholly separate provision. *See* The National Defense Act of 1916, ch. 134, § 111, 39 Stat. 166.[23]

Appellants in the *Selective Draft Law Cases* were not members of the organized militia or the National Guard governed by 39 Stat. 166, but merely American citizens between the ages of 21 and 30. 245 U.S. at 376; Brief for the United States in the *Selective Draft Law Cases* at 3, 60. From early in the history of the Republic, Congress has provided that all males between certain ages were members of the militia. *See* Act of May 8, 1792, 1 Stat. 271. Beginning in 1903, however, Congress strictly differentiated between the "unorganized militia" of all men between certain ages, which existed only in name and principle, and the "organized militia" or the *actual* state militia troops which became known also as the National Guard.

Appellants in the *Selective Draft Law Cases* argued that the militia federalization clause allows the militia to be called forth only to execute the laws, suppress insurrections or repel invasions. Hence, as members of the

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[23] In *Ex parte Dostal*, 243 F. 644 (N.D. Ohio 1917), an Ohio federal district court upheld the constitutionality of 39 Stat. 166, § 111, as permissible "in view of the then existing emergency."

unorganized militia, they argued that the Constitution prohibited the federal government from calling them into federal service for a foreign war. The Court rejected this claim finding that appellants' position logically prevented Congress from *ever* raising an army to fight a foreign war. 245 U.S. at 377-78.

The Court's opinion also suggested plenary federal power over the militia or National Guard in time of national exigency or emergency. In describing the interplay between the "military" or "army" powers and militias clauses, the Court found that, in order to remedy an unworkable aspect of the Articles of Confederation,[24] the Constitution delegated the states' power to call forth the militia to Congress, However, the Court continued, the superseding authority of the "army power" or the "military power" to call forth the militia was specifically confined to "exigencies." The Court stated:

> [t]he duty of exerting the [military] power thus conferred in all its plenitude was not made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the *exigencies* which would call it in part or in whole into play.

Id. at 382-83 (emphasis added).

In the absence of a "strict necessity" or exigency and congressional use of the military power, the Court

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[24] Under the Articles of Confederation, the states had the power to call forth their militias and the central government only the authority to request quotas of troops. This proved unworkable because the states could resist or delay in responding. *See Selective Draft Law Cases*, 245 U.S. 366, 380-81 (1918).

suggested that the states, under the militia clauses, controlled the training of these militias. In this light, the Court declared that the militia power of the states

> diminished the occasion for the exertion by Congress of its military power beyond the *strict necessities* for its exercise by giving the power to Congress to direct the organization and training of the militia (evidently to prepare such militia in the event of the exercise of the army power) *although leaving the carrying out of such command to the states.*

Id. at 383 (emphasis added).

A proper construction of the interplay between the army and militia clauses should not confuse their separate areas of authority "to the end of confusing both the powers and thus weakening or destroying both," the Court added. *Id.* at 384. The court of appeals, by subordinating the militia training clause to the army clause in the absence of war or exigency, departed from this Court's understanding of the interplay between the two clauses.

The court of appeals erred in construing this Court's holding in the *Selective Draft Law Cases* to extend beyond times of war or even exigency. A-10. It maintained that the *Selective Draft Law Cases* stand for the proposition that the army power supersedes at will the states' reserved authority over the organized militia or National Guard. A-10-12. Clearly, however, the opportunity for such a decision was not before the Court in the *Selective Draft Law Cases*. The question before it was the far narrower one of whether the militia clauses prevented Congress from conscripting ordinary citizens, not members of the

organized militia or National Guard, during a declared war. To the extent that the baroque language of Chief Justice White can be given a broader meaning than this, it is *dicta*. Further, any construction of the *Selective Draft Law Cases* which provides that the army clause can supersede the states' reserved authority over the militia at will is both contrary to the clear terms of the Constitution, the historical intent of the Framers, and the consistent understanding of Congress.

B. The Concept Of Dual Enlistment Cannot Negate Reserved State Authority Over Training The Militia.

The court of appeals found that the "dual enlistment" concept created in the National Defense Act Amendments of 1933 transformed the character of state National Guard members by placing them at the disposal of the federal government at all times.[25] This finding is fundamentally incorrect. The dual enlistment system did require state guardsmen to concurrently become members of a new army reserve organization, the National Guard of the United States.[26] But the 1933 Act did not change the state character of the National Guard and, in fact, allowed the

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[25] *See* Act of June 15, 1933, ch. 87 § 5, 48 Stat. 155; Court of Appeals Opinion, A-10; District Court Opinion, A-149-50, *see also Dukakis v. United States Department of Defense*, 686 F.Supp. 30, 36 (D.Mass. 1988), *aff'd*, 859 F.2d 1066 (1st Cir. 1988), *cert. denied sub nom., Massachusetts v. United States Department of Defense*, ___ U.S. ___, 109 S.Ct. 1743 (1989).

[26] It is important to note that the National Guard of the Untied States does not exist apart from the state National Guards. It is not in any sense a separate reserve with separate membership.

federal government to order these reserves to active duty only in an *emergency* declared by Congress. Through dual enlistment, Congress did nothing more than *formalize* the existence of federal power over the militia in an exigency as intended by the Framers and as recognized by this Court in the *Selective Draft Law Cases*. The 1933 Act enabled federal mobilization of the National Guard in units during an emergency, but did not alter the state's responsibility for training.

Acknowledging this reality, the Senate Report accompanying the 1933 Act stated that "control, officering, and discipline [of the National Guard] except when ordered out pursuant to an emergency declared by Congress, [is left] with the respective States, just as at present. The relation of the guard to the respective States during peace is in no wise affected or altered." S.Rep. No. 135 at 2. According to the House Report, the 1933 Act "reserv[ed] to the states their right to control the National Guard or the organized militia *absolutely* under the militia clause of the Constitution in time of peace." H.R. Rep. No. 141 at 5 (emphasis added).

As with a variety of federal/state joint ventures, the carrot of federal funding, together with the stick of federal compliance regulation, can exert a profound and controlling influence over state actions. Speed limits, drinking ages, the development of roadways and power projects, the basic policies of hiring practices of state agencies and universities, among many others, can be subject to an almost *defacto* federal supervision. This *defacto* legislative power, however, cannot nullify the express terms of the Constitution.

Congress, and the federal government, no matter how well intentioned, no matter how much more efficient the result might be, cannot simply call the militia a different name and subject it to plenary federal control. As the court of appeals dissent concluded:

> Federalism is not yet meaningless. It remains a vital element in our constitutional system, both as a check on the unwise use of central power and a bulwark of the freedom that derives from local autonomy. In this light it is undeniable that fundamental powers given to the States explicitly in the constitution—whether these powers concern civil rights, property rights or state militias—cannot in the absence of the formal amendment process be rendered a legal nullity by the sheer force of a political expediency.

Court of Appeals Dissenting Opinion at A-61.

The court of appeals found support for its conclusion that the dual enlistment system gives the federal government plenary control over the National Guard in the cases of *Johnson v. Powell*, 414 F.2d 1060 (5th Cir. 1969) and *Drifka v. Brainard*, 294 F. Supp. 425 (W.D. Wash. 1968). Court of Appeals Opinion at A-10; District Court Opinion at A-150. In both cases, members of the National Guard challenged the constitutionality of a presidential order to active duty under Public Law 89-687, which provided the President with temporary authority, based on the determination of presidential necessity, to order a member of the National Guard to active duty for up to twenty-four months. This statute was enacted after passage of the Gulf of Tonkin Resolution, *see* Act of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (1964), pursuant to the "war powers" of Congress, *Phile v. Corcoran*, 287 F. Supp. 554, 561 (D. Colo. 1968).

The guard members in both cases alleged *inter alia* that because the duty did not fall within the prescribed purposes under the militia federalization clause, the order to active duty was unconstitutional. The *Johnson* and *Drifka* courts upheld the statute under the army power and the necessary and proper clause.

The constitutionality of the prescribed order to active duty is not questioned here. The orders were issued under the authority of the Gulf of Tonkin Resolution and pursuant to the war powers of Congress. However, to the extent that *Johnson* or *Drifka* can be read to suggest that (1) the *Selective Draft Law Cases* held that the army power supersedes the militia power at will when national exigency is present or (2) that the dual enlistment system in some way nullifies or circumvents reserved state authority embodied in the militia clauses, they are in error.

V. THE MONTGOMERY AMENDMENT UNNECESSARILY NULLIFIES THE MILITIA TRAINING CLAUSE.

The Montgomery Amendment clearly nullifies the militia training clause in the name of exercising army clause power, thereby violating the principle that constitutional provisions are to be construed harmoniously. It is unnecessary to nullify an express constitutional reserved power in order to protect the nation because the National Guard can be federalized for any national emergency. Respondents' policy concerns regarding the level of readiness of the nation's defense and the authority to conduct foreign policy are unsupported and cannot justify elimination of an express state power.

A. The Militia Training Clause Is Nullified By The Montgomery Amendment.

The Montgomery Amendment provides that governors are prohibited from withholding consent under 10 U.S.C. § 672(b) and (d) for overseas peacetime duty of the National Guard if the reasons for the objection is the "location, purpose, type, or schedule" of the duty. 10 U.S.C. § 672(f). The Montgomery Amendment clearly eliminates the intended role of the states as a check on the abuse of federal military power. Moreover, even the notation on legislative intent suggesting governors can withhold consent in local emergency is illusory.[27] Minnesota has approximately 13,000 members of the National Guard. At most, only several hundred will be in federal training at any one time. To suggest that a governor will ever be able to withhold consent under the Montgomery Amendment assumes (1) local emergencies can be adequately predicted in advance, and (2) a governor can persuade federal authorities that National Guard members designated for training are needed for state purposes when the overwhelming majority of the National Guard remains at home. When viewed in this light, it is clear that the restrictions placed on governors consent in the Montgomery Amendment nullifies the militia training clause.

Without gubernatorial authority to withhold consent to National Guard training missions outside the United States when there is no national emergency, the constitutionally reserved state authority over training is made "shadowy and insubstantial," *Prigg v. Pennsylvania*, 41

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[27] *See* Legislative History, *supra*, at 32.

U.S. (Pet.) 539, 612 (1842), and unnecessarily subordinated to the Army clause. The army and militia training clauses should be construed harmoniously. Instead, the court of appeals construction "weakens or destroys" the militia training clause, contrary to this Court's warning in the *Selective Draft Law Cases*, 254 U.S. at 384.

Clearly, if the integrity of the militia clauses are to be preserved, there has to be a line over which the federal Government cannot cross with its army power.[28] That line is indicated by the words of the Constitution, the intent of the Framers, the Supreme Court's deliberations and the considerations of a deliberative Congress in the 199 years prior to 1986. That point is a "national exigency" or "national emergency."

B. The Montgomery Amendment Is Unnecessary Because The National Guard Can Be Federalized In A National Emergency.

The militia training clause, properly construed, does not interfere with training or any other aspect of national defense. It merely requires Congress or the President to

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[28] Even the Massachusetts District Court, which upheld the Montgomery Amendment, recognized that accepting the respondent's position at face value would lead to the abolition of the militia by transforming it into a part of the army. *Dukakis*, 686 F. Supp. at 36. That Court acknowledged that there must be a line of reserved state authority over which the federal government cannot cross. Unfortunately, the Court neither explained where that line is nor why it believed the Montgomery Amendment fell on the permissible side of the line.

declare a national emergency before invoking the army clause to send state National Guard troops on peacetime training missions. The national emergency requirement is both principled and practical. It is principled because it effectuates the Framers' intention to reserve militia training authority to the states to the extent it does not hamper the national defense in an emergency. It is practical because it unleashes without reservation the army power whenever required by the national interest.

James Madison considered that the federal government's authority would be "most extensive in times of war and danger." *The Federalist No.* 45 (Cooke at 313). Alexander Hamilton, writing of the army clause, stated that because it was impossible to foresee future "national exigencies," or "circumstances which may affect the public safety," "there can be no limitation of that authority which is to provide for the defense and protection of the community. . . ." *The Federalist No.* 23 (Cooke at 147-48). However, Hamilton also argued that the federal-state balance provided in the Constitution was designed to permit the emergence of strong militias independent of federal control to effectively counter a standing federal force. *The Federalist No.* 29 (Cooke at 184-85). The Framers' conception of the army clause providing unlimited federal authority to provide for the national defense counterposed with a state militia able to resist federal authority requires state sovereign interests to be respected in peacetime absent a threat to the national security.

The Presidential and Congressional powers to authorize peacetime National Guard training without state consent in a national emergency, like the express power to federalize the militia under the federalization clause, is

"to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." *Martin v. Mott*, 25 U.S. 19, 30 (1827).

It is questionable whether the basis of a declaration of a national exigency for the purpose of authorizing peacetime National Guard training without state consent can be challenged because to do so "might reveal important secrets of State, which the public interest, and even safety, might imperiously demand to be kept in concealment." *Id.* at 31; *see also Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The national exigency exception to state authorization of peacetime militia training assures the nation that no state's objections to peacetime National Guard training will jeopardize national security interests.[29]

The Montgomery Amendment is an unnecessary and sweeping abridgment of state militia training authority. Adherence to the plain meaning of the militia training clause and the Framers' intent does not handcuff federal military powers in emergency circumstances.

C. The Montgomery Amendment Cannot Be Justified On Policy Grounds.

The Montgomery Amendment is an unnecessary abridgment of state reserved authority. It cannot be

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[29] The states, no less than the federal government, "are interested in the safety of the United States, the strength of its military forces, and its readiness to defend them in war and against every attack of public enemies. . . ." *Hamilton v. Regents of the University of California*, 293 U.S. 245, 260 (1934).

justified as a measure required by defense or foreign policy considerations.

1. Claims that reserved state training authority adversely affects the national defense are unsupported.

A proper harmonization of the army and militia training clauses permits the federal government to quickly assume total and unreviewable control of the National Guard by declaring a national emergency. In any situation demanding quick action, there would be no state-imposed obstacles to hinder—in any sense—the federal government's immediate response.

There is no evidence that the absence of the Montgomery Amendment before its enactment hampered the nation's defense in any way. No governor has ever objected to missions designed to train the National Guard for defending the nation. As the respondent Chief of the National Guard Bureau[30] advised Congress in 1986:

> [N]o governor has said he opposes overseas deployment training—all have said they wholeheartedly believe in it and understand and support the need for it.

Court of Appeals Dissenting Opinion at A-56 (*quoting 1986 Senate Hearings* at 95-5).

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[30] The National Guard Bureau is a government agency serving as the channel of communication between federal and state military authorities. 10 U.S.C. § 3040 (1988).

No governor ever withheld consent to a training mission for any reason prior to 1986. The states have never opposed training on the basis of terrain or climate. The states have never opposed the principle of guard exercises coordinated with regular forces. In short, the states have never opposed the substance or content of training—nor are they likely to do so in the future. *Id.*

The controversy in this case began when the national government began to use statutory training provisions for purposes that were perceived to be other than training. In 1983, National Guardsmen participated in the Grenada mission, Pet. for Rehearing and Suggestion For Rehearing En Banc at 6, apparently while on federal "training" duty. Note, *Should I Stay Or Should I Go: The National Guard Dances To The Tune Of Two Masters*, 39 Case W. Res. L. Rev. 165, 209 (1988-89). In 1986, National Guard members from Washington while on a three week "training" mission were used in the bombing raid on Libya. *Id.* at 208; Court of Appeals Dissenting Opinion at A-60 and n.35. Finally, in 1986 and 1987, Minnesota and other state National Guardsmen were sent to politically sensitive Honduras for training and other purposes. Complaint, para. 17, J.A. 6; Webb Statement, J.A. 20.

If the Honduran training controversy is typical of the practical dangers this country faces in the absence of the Montgomery Amendment, there is no policy justification for the statute. Gen. La Verne Weber (retired), former Chief of the National Guard Bureau, told Congress that the Honduran controversy had little effect on overall guard training operations. Court of Appeals Dissenting Opinion at A-57 n.33 (citing Weber testimony). General

Walker of the National Guard Bureau, testified that during the midst of the Honduran training controversy a total of 48 people were prevented from training in Honduras. *Id.* at A-59 n.34 (citing Walker testimony). He noted that these 48 people constituted .0001 percent of the total deploying force, less people than report to sick call on an average base on a given day, less people then have had to forego scheduled training for employer's support reasons and less people then have had to forego participation due to other commitments. *Id.*

Clearly, respondents' contention in the courts below that continued adherence to the reserved state training authority will severely hamper our nation's defense is unsupported. The federal government can quickly overcome any state-imposed hinderance by declaring a threat to the national security and federalizing the National Guard.

2. Claims that state consent for National Guard training improperly affects foreign policy are unsupported.

Respondents have also argued in the courts below that the reserved state training authority impermissibly permits governors to conduct "foreign policy." As a practical matter, this concern is also unsupported. The mere power to withdraw consent to an overseas training mission can hardly be considered "conducting foreign policy."

The Framers did not, of course, intend the states to make positive national policy in the area of defense or

foreign relations matters.[31] However, they did intend the states, through their control over state militias, to serve as a check on the abuse of federal military power.

Even though "[p]ower over external affairs is not shared by the States," *United States v. Pink*, 315 U.S. 203, 233 (1944), restraints on the federal government are not waived simply because a constitutionally protected activity may have an indirect effect on foreign policy. Thus, the First Amendment is not nullified by the federal government's interest in protecting the dignity of foreign missions, *Boos v. Barry*, 485 U.S. 312, 329 (1988). *See also, Reid v. Covert*, 354 U.S. 1, 16 (1957) (neither treaty nor executive agreement "can confer power on the Congress . . . which is free from the restraints of the Constitution."); *DeGeofroy v. Riggs*, 133 U.S. 258, 267 (1890) (suggesting that federal government may not by treaty deny state a republican form of government); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1871) ("treaty cannot change the Constitution").

Thus, if the states' reserved authority for training indirectly in some way affects foreign policy, it is a permissible effect. In the past, this authority has not affected foreign policy any more than a vigorous national public debate. It is unlikely to do so in the future.

CONCLUSION

The court of appeals decided that Congress has unlimited authority to disregard the militia training

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[31] *See* U.S. Const., art I, § 10, cls. 1, 3.

clause at any time, for any reason, and for any duration. An express reserved state power, so rarely granted in the Constitution, no longer has any meaning. Such a decision has far-reaching and unwise consequences. It means simply that the National Guard can be permanently federalized and that the essential state character of the National Guard as we know it today can be eliminated. Such a result is clearly contrary to the plain meaning of the Constitution, the Framers' intent in drafting the Constitution, and the consistent understanding of the Constitution over 200 years. A far better result is one that harmonizes all clauses of the Constitution, observes to the Framers' intent, limits federal training authority over the National Guard, and permits federalization when the national security is threatened. Petitioners respectfully urge this Court to reverse the decision of the court of appeals holding that the Montgomery Amendment is constitutional.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Army Clause (Art. I, § 8, cl. 12) provides:

> [The Congress shall have Power] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; * * *.

The Militia Clauses (Art. I, § 8, cls. 15 and 16) provide:

> [The Congress shall have Power] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *.

10 U.S.C. 672(b) and (d) provide:

> § 672. Reserve components generally
>
> * * *
>
> (b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may

not be ordered to active duty under this subsection without the consent of the governor of the State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.

* * *

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.

* * *

10 U.S.C. 672(f), provides:

(f) The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule such active duty.